United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7345

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEWIS GENERAL TIRES, INC.,
Plaintiff-Intervenor

-vs-

DONALD E. LEWIS,
Defendant.

DONALD E. LEWIS,
Plaintiff,

-vs-

S. L. & E. INC., a corporation
LEON E. LEWIS, SR.
ALAN E. LEWIS
LEON E. LEWIS, JR.
RICHARD E. LEWIS, SR.,
Defendants.

BRIEF FOR LEWIS GENERAL TIRES, INC.
AS PLAINTIFF-INTERVENOR-APPELLANT

Kaufman, Kenning, Tyle, Pauley,
Baker & D'Amanda
1008 Times Square Building
45 Exchange Street
Rochester, New York 14614

75-7349

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEWIS GENERAL TIRES, INC.,
3870 W. Henrietta Road (Town of Henrietta)
Rochester, New York 14623

Plaintiff-Intervenor,

-vs-

DONALD E. LEWIS
18123 Scottsdale Boulevard
Cleveland, Ohio 44122

Defendant.

Civ. 1973-396
Docket #75-7349

DONALD E. LEWIS
18123 Scottsdale Boulevard
Cleveland, Ohio 44122,
on his own behalf and on behalf of all other shareholders similarly situated of S. L. & E. Inc. and in the right of S. L. & E. Inc.

Plaintiff,

-vs-

S. L. & E. INC., a corporation
260-264 East Avenue
Rochester, N. Y.

Defendant,

and

LEON E. LEWIS, SR.,
145 Inglewood Drive
Rochester, N. Y.

Defendant,

and

ALAN E. LEWIS
1100 S.E. 10th Street
Deerfield Beach, Florida,

Defendant,

and

LEON E. LEWIS, JR.
132 Hollybrook Drive
Penfield, New York,

Defe ndant

---

and

RICHARD E. LEWIS, SR.
75 Pickwick Drive
Brighton, New York,

Defendant.

BRIEF FOR LEWIS GENERAL TIRES, INC.,
AS PLAINTIFF-INTERVENOR-APPELLANT

PRELIMINARY STATEMENT

The defendants, S. L. & E. Inc., Leon E. Lewis, Sr. (deceased on April 7th, 1975), Alan E. Lewis, Richard E. Lewis, Sr., and the plaintiff-intervenor, Lewis General Tires, Inc. made a Cross-Motion returnable on March 10th, 1975, for an Order to dismiss the Complaint of the plaintiff in the original action and for Summary Judgment on the grounds set forth in the Notice of Cross-Motion, and in the alternative to stay all further proceedings by the plaintiff, Donald E. Lewis in the United States District Court, for the Western District of New York, or in any other court, until such time as the issues in dispute between all parties, by reason of an Agreement dated June 25th, 1962, are submitted to binding arbitration and

determined, and for an Order fixing the time for further depositions.

An application of the defendants in the original action was denied by the Hon. Harold P. Burke, United States District Court Judge, by Order of the court dated March 6th, 1974, and the Cross-Motion filed by Lewis General Tires, Inc., plaintiff-intervenor, for the first time included Lewis General Tires, Inc., by reason of the fact that Lewis General Tires, Inc. was contractually bound to buy the fifteen shares of stock owned by the plaintiff, Donald E. Lewis on the 1st day of June, 1972, in accordance with paragraph THIRD of the Stockholders' Agreement dated June 25th, 1962.

The Cross-Motion filed March 10th, 1975 was in all respects denied, and an appeal was taken from the Order of the Hon. Harold P. Burke, United States District Court Judge, Western District of New York, in so far as it relates to the denial of the relief prayed for in the Cross-Motion, that all issues be submitted to binding arbitration. Lewis General Tires, Inc. at all times attempted to abide by its obligation in accordance with the Stockholders' Agreement of June 25th, 1962, and the plaintiff-intervenor, Lewis General Tires, Inc., asserts that a dispute has arisen between Donald E. Lewis, as plaintiff, within the meaning of paragraph "Eleventh" of the Stockholders' Agreement of June 25th, 1962, and all of the defendants, and Lewis General Tires, Inc. as plaintiff-intervenor.

The plaintiff, Donald E. Lewis commenced a stockholders' derivative action, asserting that Lewis General Tires, Inc. did not pay a sufficient

amount of rent for real property owned by S. L. & E. Inc. at 260 East Avenue, in the City of Rochester, New York, between the years of 1962 and 1972, and the plaintiff-intervenor, Lewis General Tires, Inc. contends that since Donald E. Lewis was the only person who was involved as a plaintiff in the original action, and represented no other interests, that this action could not be a stockholders' derivative action, as such, and since the only question to be resolved upon binding arbitration, was pursuant to Section 7501 of the Civil Practice Laws and Rules of the State of New York, all issues between the plaintiff, Donald E. Lewis, including rental value for the premises at 260 East Avenue, Rochester, New York, during the years of 1962 through 1972, as well as the value of the fifteen shares of stock owned by Donald E. Lewis in S. L. & E. Inc. on June 1st, 1972, could be determined through binding arbitration; that the Stockholders' Agreement in all respects, including the requirement of referring any dispute among the parties to binding arbitration, amounts to a contractual obligation between Donald E. Lewis and all of the other parties as defendants, and Lewis General Tires, Inc. as plaintiff-intervenor, and must be enforced, whether such issues are heard in the Federal Court or in the Supreme Court of the State of New York.

FACTS

The initial action herein was brought by Donald E. Lewis as a ten percent (10%) stockholder of S. L. & E. Inc. Donald E. Lewis owned

ten percent (10%) of the stock of S. L. & E. Inc. by reason of a gift made by his father, Leon E. Lewis, Sr. during the year of 1962, and when the gift was made, a similar gift of fifteen (15) shares of S. L. & E. Inc. was also given to each of the five other children of Leon E. Lewis, Sr., namely, Alan E. Lewis, Richard E. Lewis, Sr., Leon E. Lewis, Jr., Carol Rankin and Margaret Mead. A Federal gift tax return was duly filed on January 3rd, 1963, indicating that the aggregate value of all the stock was the sum of Sixty Thousand Dollars ($60,000) and each donee's interest, including that of Donald E. Lewis, was valued at the sum of Ten Thousand Dollars ($10,000).

At the time the gift was made a Shareholders' Agreement was signed by all six donees and the Agreement was dated June 25th, 1962. Alan E. Lewis, who was then the president of Lewis General Tires, Inc. agreed in behalf of Lewis General Tires, Inc. to purchase all of the stock of each of the donees during the year of 1972, for it was the intention of the donor that when a mortgage was paid off to the Genesee Valley Union Trust Company, now Marine Midland Bank-Rochester, which mortgage encumbered the property owned by S. L. & E. Inc. at 260 East Avenue, Rochester, New York, that each of the donee stockholders would transfer their stock to Lewis General Tires, Inc. in the event that such stockholder was not then an owner of stock of Lewis General Tires, Inc.

In accordance with the Agreement which was signed by all

of the stockholders, Lewis General Tires, Inc. was obligated to purchase the stock of S. L. & E. Inc. for the book value, and payments had to be made by Lewis General Tires, Inc. to each selling donee stockholder who was not then a stockholder of Lewis General Tires, Inc. and payments were to be made over the term of ten (10) years. During the year of 1972, Lewis General Tires, Inc. attempted in all respects to abide by its obligation to purchase the stock of each donee stockholder not then a shareholder of Lewis General Tires, Inc. and accordingly, the stock of Alan E. Lewis, Carol Rankin and Margaret Mead were thereafter purchased and installment payments are being made to each of these stockholder donees, in accordance with the terms of the Agreement dated June 25th, 1962, since four of the six donee stockholders, who are children of Leon E. Lewis, Sr. were not stockholders of Lewis General Tires, Inc. on June 25th, 1972.

The principal asset of S. L. & E. Inc. is a building on the corner of Pitkin Street and East Avenue, in the City of Rochester, New York, which property was subject to a written Lease between S. L. & E. Inc. and Lewis General Tires, Inc., which Lease was signed by Leon E. Lewis, Sr., as President of S. L. & E. Inc. and Alan E. Lewis, as Vice-President of Lewis General Tires, Inc., on the 26th day of February, 1956; the Lease provided for an annual rental of Fourteen Thousand Four Hundred Dollars ($14,400.00 and was a ten (10) year Lease, with an effective date

commencing on March 1st, 1956 and terminating on February 28th, 1966. That at all material times, Lewis General Tires, Inc. paid the sum of Fourteen Thousand Four Hundred Dollars ($14,400.00) per annum for the use of the building at 260 East Avenue, Rochester, New York, and continued to pay the same rental at all times after the stock of S.L.& E. Inc., owned by L[illegible], Lewis, Sr. was given in equal shares to his six children.

Donald E. Lewis of Cleveland, Ohio, commenced a class action against S. L. & E. Inc., Leon E. Lewis, Sr., his father, Alan E. Lewis, his brother, Leon E. Lewis, Jr., his brother, and Richard E. Lewis, Sr., his brother, but failed to designate Lewis General Tires, Inc. as a defendant in the action. In fact, Donald E. Lewis represents no other stockholder except himself. After the action was commenced, Lewis General Tires, Inc. made an application to intervene, by reason of the fact that it was either an indispensable or necessary party to the action, particularly, in view of the fact that it was compelled to purchase the stock of all stockholders of S. L. & E. Inc., who were not then owners of stock of Lewis General Tires, Inc. on June 25th, 1972, and Lewis General Tires, Inc. had a right to acquire the stock of Donald E. Lewis, in accordance with the mutual covenants contained in the Agreement of June 25th, 1962. On the 6th day of March, 1974, by Order of the United States District Court, Lewis General Tires, Inc. was permitted to intervene.

A Notice to examine Donald E. Lewis was duly served, but

on two occasions, Donald E. Lewis failed to appear for an Examination before Trial and thereafter, upon Motion the Hon. Harold P. Burke, United States District Court Judge, signed an Order on November 14th, 1974, directing among other things, that Donald E. Lewis appear for the purpose of taking his deposition, and at the same time that the deposition of Leon E. Lewis, Sr. be taken on all matters relating to the complaint of the plaintiff, Donald E. Lewis, herein. The Examination before Trial of Donald E. Lewis and Leon E. Lewis, Sr. was conducted on the 14th day of November, 1974, and that examination established clearly that Donald E. Lewis represented no other shareholder other than himself, and that his only complaint was that Lewis General Tires, Inc. should have been charged more rent than provided for in the Lease of 1956, which ten year Lease was being in all respects complied with and was in existence six (6) years before Donald E. Lewis became the owner of fifteen (15) shares of S. L. & E. Inc., by reason of the gift of his father, Leon E. Lewis, Sr.

Leon E. Lewis, Sr., died at Rochester, New York, on April 7th, 1975, at the age of eighty-six (86) years and since the action of Donald E. Lewis is still pending, the title of the action will have to be amended as against Lincoln First Bank of Rochester, Rochester, New York, due to appointment of Lincoln First Bank of Rochester, as Executor and Trustee of the Estate of Leon E. Lewis, Sr.

Donald E. Lewis has failed to comply with the Shareholders'

Agreement dated June 25th, 1962, but Lewis General Tires, Inc. has attempted consistently at all times since 1972 to comply with the terms of the Agreement. Since a dispute has arisen, it is submitted that paragraph ELEVENTH of the Agreement is controlling, and that Donald E. Lewis should be compelled to submit to binding arbitration in accordance with paragraph ELEVENTH of the Agreement.

DISCUSSION

The courts historically looked upon arbitration clauses with disfavor. Recently, however, there has been a trend towards liberal enforcement of agreements to arbitrate. If an action is commenced in violation of an arbitration clause, the court must determine whether the state of federal arbitration act applies. This decision must be made regardless of whether the action is commenced in a New York or Federal Court. See, e.g., In re Rederi, 25 N.Y. 2d 576, 253 N.E. 2d 774, 307 N.Y.S. 2d 660 (1970), cert. denied, 398 U.S. 939 (1970). After resolving this problem, the court should determine the applicability of the arbitration clause to the action brought by the plaintiff. Assuming that the clause mandates arbitration, the court must fashion the procedural remedy under the relevant statute.

Two arbitration acts compete for applicability in the instant case: the Federal Arbitration Act, 9 U.S.C. §§1-14 (1970) and N.Y.CPLR

§7501 et seq. (McKinney 1963). The substantive portion of the Federal Arbitration Act provides:

> "A written provision in any maritime transaction of a contract evidencing a transaction involving commence to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract". 9 U.S.C. §2 (1970)

New York affords similar treatment to arbitration agreements:

> "A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the Justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute". N.Y. CPLR §7501 (McKinney 2963).

The Federal Arbitration Act applies"....in any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. §2 (1970). Based on the power of Congress to regulate interstate commerce, the Supreme Court has construed this statute to create a substantive federal law. Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 404-405 (1967); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F2d 402 (2d Cir. 1959), cert. granted, 362 U.S. 909(1960),

dismissed under Rule 60, 364 U. S. 801 (1960). Whenever an action is commenced in Federal court and it does not involve maritime or interstate commerce transactions, then the state arbitration laws apply. Bernhardt v. Polygraphic Company of America, Inc., 350 U.S. 198 (1955). New York has adopted a similar approach and applies Federal law whenever the underlying controversy would be governed by the Federal Arbitration Act if brought in Federal court. In re Rederi, 25 N.Y. 2d 570, 255 N.E. 2d 774, 307 N.Y.S. 2d 660 (1970), cert. denied, 398 U.S. 939 (197). Accordingly the Federal court should apply New York law unless the dispute arose from a contract evidencing a transaction involving interstate commerce.

Several types of contracts have been invariably construed to evidence a transaction involving interstate commerce. The class of contracts involving the interstate sale of goods are transactions involving interstate commerce. (See, e.g., Collings Radio Co. v. Ex-Cell-O Corp., 467 F. 2d 995 (8th Cir. 1972). Furthermore, contracts requiring the interstate shipment of goods usually are transactions involving interstate commerce. See, e.g., Bartell Media Corp. v. Fawcett Pringing Corp., 342 F. Supp. 196 (S.D.N.Y. 1972); Joseph Muller Corp. v. Zurich Commonwealth Petrochemicals, Inc., 334 F. Supp. 1013 (S.D.N.Y. 1971); other contracts, such as consultation contracts, franchise agreements and construction contracts, are determined on a case by case basis with

with the "interstate controls" being the determinant. See, e.g., Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967); Buffler v. Electonic Computer Programing Institute, Inc., 466 F. 2d 694 (6th Cir. 1972); Sears Roebuck & Co. v. Glenwal, 325 F. Supp 86 (S.D.N.Y. 1970), aff'd. 442 F. 2d 1350 (2d Cir. 1971).

Despite the differences in wording, both of these statutes have been construed similarly. One of the last significant differences was removed in 1973 when the New York Court of Appeals adopted the Federal view that fraud in the inducement should be determined by the arbitrator unless the fraud permeates the entire contract, including the arbitration clause. Compare In re Weinrott, 32 N.Y. 2d 190, 298 N.E.2d 42, 344 N.Y.S. 2d 848 (1948) with Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d 402 (2d Cir. 1959), cert. granted, 362 U.S. 909 (1960), dismissed under Rule 60, 364 U.S. 801 (1960) and Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967). In fact, the Court of Appeals in Weinrott indicated that the state and Federal arbitration statutes are almost identical and that the court intended to eliminate Federal-State forum shopping. Furthermore, the court declared that whether Federal or state law applied should not be determinative of the arbitrability of a dispute. In re Weinrott, 32 N.Y. 2d 190, 199-200 fn. 2, 298 N.E. 2d 42, 48 fn. 2, 344 N.Y. 2d 848, 856-857 fn. 2 (1973). Therefore, if the arbitration clause applies to the action brought by the Ohio plaintiff,

the result should be the same regardless of whether the court applies state or Federal law.

Traditionally, the New York courts have refused to enforce arbitration agreements when the underlying controversy involved the management of a corporation. See, e.g., In re Burkin, 1 N.Y.2d 570, 136 N.E. 2d 862, 154 N.Y.S.2d 898, 64 A.L.R.2d 638 (1956). Since enactment of the CPLR, this trend has been reversed and prior cases are probably no longer valid because the CPLR deleted the "subject of an action" requirement. See 8 Weinstein-Korn-Miller, New York Civil Practice ¶¶ 7501.04, .15, .18 (1973). For instance, modern cases recognize the validity of Stockholders' Agreements to arbitrate disputes over the purchase price of optional stock, the removal of a director for cause, and disagreements among a Board of Directors. See, e.g., Kolmer-Marcus Inc. v. Winer, 32 App. Div. 2d 763, 300 N.Y.S. 2d 952 (1st Dep't. 1969) aff'd, 26 N.Y.2d 795, 257 N.E. 2d 664, 309 N.Y.S. 2d 220 (1970); Vogel v. Lewis, 25 App. Div. 2d 212, 268 N.Y.S. 2d 237 (1st Dep't 1966), aff'd 19 N.Y. 2d 589, 224 N.E. 2d 738, 278 N.Y.S. 2d 236 (1967). Furthermore, as a matter of public policy, the courts have recognized that arbitration of disputes in closed corporations should be encouraged. See, e.g., Siegel v. Ribak, 43 Misc. 2d 7, 249 N.Y.S. 2d 903 (Sup. Ct. Kings County 1964). (Public policy favors arbitration in a derivative suit against the directors of a closed corporation.)

Therefore, unless some statute limits the arbitrability of the dispute, the court should prevent the continuance of the plaintiff's action.

While several Federal laws affect arbitrability (such as labor laws), only Section 14 of the Securities Act of 1933 appears to be relevant in the instant case. 15 U.S.C. §77a et seq. (1970). Basically the law is very simple. If the cause of action is based on or created by the Federal Securities Law, then the arbitration agreement is invalid and unenforceable. Wilko v. Swan, 346 U.S. 427 (1953). But see Alberto-Culver Co. v. Scherk, 417 U.S. 506 (1974) (section 14 of the Securities Act of 1933 does not apply to international transactions.) When the plaintiff's action is based on both common law and Federal Securities Law claims, the court has three options: 1) stay the common law claims and allow them to be arbitrated while the Federal Securities Law claims are prosecuted in court; and 3) refuse to stay the action and try both claims in court. See Legg, Mason & Co. v. Mackall & Co. Inc., 351 F. Supp. 1367 (D.D.C. 1972); Shapiro v. Jaslow, 320 F. Supp. 598 (S.D.N.Y. 1970). The first alternative should be elected by the court if the arbitration will not render the Federal Securities Law claim meaningless and the delay will not be prejudicial to the plaintiff. The second alternative should be chosen when it is possible to proceed with both claims at the same time, and render neither claim meaningless. Finally, the court must adopt the third alternative when arbitration of the common

law claim would render the Federal Securities Law claim meaningless. The court decides which alternative should be followed. Shapiro v. Jaslow, 320 F. Supp. 598 (S.D.N.Y. 1970).

Procedurally, the remedy is very similar under state and Federal law. Section 7503 (a) of the New York CPLR provides that if an arbitrable claim is pending in an action, a motion for a stay and to compel arbitration should be made. Under section 3 of the Federal Arbitration Act, the Federal court is empowered to stay a proceeding until arbitration has been completed. 9 U.S.C. §3 (1970). A Federal court can also grant a stay under state law if the Federal Arbitration Act is not applicable. See Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Commission, 387 F. 2d 768 (3d Cir. 1967). Neither a Federal nor a state court will dismiss an action based on an arbitration agreement. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Griesenbeck, 28 App. Div. 2d 99, 28 N.Y. 2d 580 (1st Dep't 1967), aff'd, 21 N.Y. 2d 688, 234 N.E. 2d 436, 287 N.Y.S. 2d 419 (1967); Amalgamated Growth Industries, Inc. v. Borcoa, Inc., 139 F. Supp. 17 (S.D.N.Y. 1956). As the Amalgamated Growth Industries case points out, this is true even if an action is commenced in Federal court and governed by the New York law relating to arbitration. Accordingly, the Federal court should stay the plaintiff's action. See generally 8 Weinstein-Korn-Miller, New York Civil Practice ¶¶ 7503.19, 20.

CONCLUSION

The Federal court will not dismiss an action merely because

it is barred by an arbitration agreement. Rather, it will stay the action pending arbitration. This is true whether the court applies Federal or State law.

Federal law relating to arbitration agreements applies to all claims arising out of maritime or interstate commerce transactions. If the action does not involve any interstate contact, then the Federal court will apply New York law. Regardless of which law is applied, the result should be the same. Both New York and Federal law relating to arbitration clauses is very similar. Both Federal and New York courts seem to have adopted the modern view that fraud in the inducement is generally a question for the arbitrator. Furthermore, disputes involving corporate management in closed corporations appear to be arbitrable under both Federal and state law, however, if the plaintiff's action is based on Federal Securities Law, then by statute an arbitration agreement is invalid. Assuming that the plaintiff's action is within the scope of the arbitration clause and does not arise under the Federal Securities Law, the Federal court should grant a motion to stay pending arbitration. To avoid forcing the court to decide whether New York or Federal law applies, the motion for a stay should be based on both Federal and State law, in the alternative.

The Order of the Hon. Harold P. Burke, United States

District Court Judge, Western District of New York, dated June 6th, 1975, in so far as it denies the Cross-Motion made on behalf of Lewis General Tires, Inc., Plaintiff-Intervenor-Appellant, should be reversed, and all issues between Donald E. Lewis and all of the defendants, and Lewis General Tires, Inc., Plaintiff-Intervenor, should be referred to binding arbitration in accordance with the terms of the Stockholders' Agreement, dated June 25th, 1962, and the action of the plaintiff, Donald E. Lewis should be dismissed, or all proceedings stayed in any court until the plaintiff has submitted the issues in dispute to binding arbitration, in accordance with the provisions of the Stockholders' Agreement, and the substantive law of the State of New York.

Respectfully submitted,

KAUFMAN, KENNING, TYLE, PAULEY,
BAKER & D'AMANDA
CHARLES B. KENNING, ESQ., of counsel,
Attorneys for Lewis General Tires, Inc.
Plaintiff-Intervenor-Appellant, and
Leon E. Lewis, Sr. (now deceased)
S. L. & E. Inc., Alan E. Lewis and
Richard E. Lewis, Sr.
Office & P.O. Address
1008 Times Square Building,
Rochester, New York (14614)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEWIS GENERAL TIRES, INC.,

Plaintiff-Intervenor,

-vs-

DONALD E. LEWIS,

Defendant.

Civ. 1973-396
Docket #75-7349

DONALD E. LEWIS, on his own behalf and on behalf of all other shareholders similarly situated of S. L. & E. Inc., and in the right of S. L. & E. Inc.

Plaintiff,

-vs-

S. L. & E. INC., LEON E. LEWIS, SR., ALAN E. LEWIS, LEON E. LEWIS, JR. and RICHARD E. LEWIS, SR.,

Defendants.

STATE OF NEW YORK)
COUNTY OF MONROE) SS.
CITY OF ROCHESTER)

CEAL M. STONE, being duly sworn, deposes and says that deponent is not a party to the within action, is over 18 years of age and resides at Rochester, New York; that on the 8th day of September, 1975, deponent served the within Brief for Plaintiff-Intervenor-Appellant upon Sheldon P. Weitzman, Esq., attorney for Donald E. Lewis, as defendant, and plaintiff in the above captioned actions, at 502 Lincoln Building, Cleveland, Ohio, (44114), the address designated by said attorney, by depositing 2 true copies of same enclosed in a post-paid properly addressed wrapper, in an official

KAUFMAN, KENNING, TYLE, PAULEY, BAKER & D'AMANDA
ATTORNEYS AT LAW
45 EXCHANGE STREET
ROCHESTER, NEW YORK
14614

depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Neal M Stone

SWORN TO before me this 9th day of September, 1975.

Marilynne Locke

MARILYNNE LOCKE
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1976

KAUFMAN, KENNING, TYLE, PAULEY, BAKER & D'AMANDA
ATTORNEYS AT LAW
45 EXCHANGE STREET
ROCHESTER, NEW YORK
14614

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E OF NEW YORK, COUNTY OF ss.:

undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

undersigned affirms that the foregoing statements are true, under the penalties of perjury.

ed: .....
The name signed must be printed beneath

TE OF NEW YORK, COUNTY OF ss.:

☐ Individual Verification being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

ne grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

worn to before me on 19 .....
The name signed must be printed beneath

TATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action,

s over 18 years of age and resides at

☐ Affidavit of Service By Mail On 19 deponent served the within upon in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Check Applicable Box

Sworn to before me on 19 .....
The name signed must be printed beneath

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certif. 1)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Kaufman, Kenning, Tyle, Pauley, Baker & D'Amanda

Attorneys for

Office and Post Office Address

1008 TIMES SQUARE BUILDING

45 Exchange Street

ROCHESTER, NEW YORK 14614

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

Kaufman, Kenning, Tyle, Pauley, Baker & D'Amanda

Attorneys for

Office and Post Office Address

1008 TIMES SQUARE BUILDING

45 Exchange Street

ROCHESTER, NEW YORK 14614

To

Attorney(s) for

Civ. 1973-396
Docket #75-7349

~~Index No.~~ Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEWIS GENERAL TIRES, INC.,
Plaintiff-Intervenor,

-vs-

DONALD E. LEWIS,
Defendant.

DONALD E. LEWIS, on his own behalf and on behalf of all other shareholders similarly situated of S. L. & E. Inc. and in the right of S. L. & E. Inc.
Plaintiff,

-vs-

S. L. &E. Inc., LEON E. LEWIS, SR., ALAN E. LEWIS, LEON E. LEWIS, JR. and RICHARD E. LEWIS,

Defendants.

ORIGINAL

AFFIDAVIT OF
SERVICE BY MAIL

Kaufman, Kenning, Tyle, Pauley, Baker & D'Amanda

Attorneys for S. L. & E. INC., LEON E. LEWIS, SR. ALAN E. LEWIS, RICHARD E. LEWIS & LEWIS GENERAL TIRES, INC.

Office and Post Office Address, Telephone

1008 TIMES SQUARE BUILDING

45 Exchange Street

ROCHESTER, NEW YORK 14614

(716) 325-4550

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for